No. 1184

MAY 20 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

MARY DOMANY and ANDREW DOMANY,
Petitioners,

vs.

OTIS ELEVATOR COMPANY and
SEARS, ROEBUCK AND CO.,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Sixth Circuit

BRIEF OF RESPONDENT SEARS, ROEBUCK AND CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 22, 1967.

The Scheffer Press, Inc.—ANdover 3-6850

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Respondent Sears, Roebuck and Co. files this brief in opposition to the petition for writ of certiorari and prays that said petition be denied.

QUESTIONS PRESENTED

The questions appearing under the heading "Questions Presented" in the petition are misleading and ignore the facts. Respondent therefore counter-states these questions more accurately as follows:

1. Did the Court of Appeals properly order a new trial because the trial court refused to submit the issue of contributory negligence to the jury?

2. Did the Court of Appeals act properly in laying down guidelines to be observed at the retrial of this case with respect to the marriage issue?

STATEMENT OF THE CASE

Suits were filed by Mary Domany and Andrew Domany against Sears, Roebuck and Co and Otis Elevator Company. Their claims arise out of an injury to Mary Domany. Andrew claimed that he was the husband of Mary. Sears in its answer, denied the material allegations of the complaint including the marital status of the plaintiffs and asserted the defense of contributory negligence.

On November 18, 1960, Mary Domany was on a descending escalator in respondent's store (R. 37-8). She claimed that the escalator stopped quickly and caused her to fall (R. 38, 68). The only other passenger on the escalator was a man about 65 years of age who was unaffected by the stopping of the escalator and simply walked away (R. 68-69, 423). Signs posted at the approach to and on the escalator cautioned passengers to hold the handrail (R. 689-690, 691-692, 869-871). Although Mrs. Domany testified she did so (R. 38, 69), an expert called in their behalf testified in response to a question of petitioners' counsel that he rode the escalator

holding on to the handrail and was unaffected by its stopping (R. 235). Witnesses for respondent Otis Elevator Company corroborated this expert's testimony and one of its witnesses testified that the escalator was designed so that a person holding the handrail would overcome any physical force applied to the body by reason of the stopping of the escalator (R. 873).

Andrew Domany testified that Mary and he were married before a justice of the peace or a minister in 1957 in Angola, Indiana, but admitted he had previously been married in Europe and had filed an action for divorce in Cleveland in 1953 against the European wife but no divorce was granted (R. 113, 114). There was no evidence showing that the European marriage was ever dissolved by divorce or otherwise terminated.

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

Contributory Negligence

In an effort to convince this Court to review the decision of the Court of Appeals, petitioners argue that its decision ordering a new trial because of the trial court's error in refusing to submit the issue of contributory negligence to the jury denied petitioners the right to a jury trial granted by the Constitution and thus so far departed from the accepted and usual course of proceedings as to call for an exercise of this court's power of supervision. The reasons advanced by petitioners are frivolous, and the cases relied upon are distinguishable or support respondent's position that the petition should be denied. A cursory examination of the petition makes it patently obvious that its essential thrust is not to demonstrate grounds for granting the writ in accordance with the criteria set forth in Rule 19 of this Court but to reargue the case and to ask this Court to review the evidence and the inferences to be drawn therefrom. This Court has long held that a writ of certiorari will not be granted for such purpose, *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273 (1937).

Petitioners erroneously contend that because Mary Domany testified she was holding the rail, there was no issue of contributory negligence to submit to the jury, relying on *Chesapeake & Ohio Ry.* v. *Martin*, 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983 (1931). Their reliance is misplaced for the decision of the Court of Appeals is not contrary to this Court's holding in *Chesapeake.*

There this Court held that the question of a witness' credibility would not permit a jury to disregard his testimony when there was nothing in the record which reflected unfavorably upon such credibility or made such testimony reasonably open to doubt. As has already been demonstrated in this case there was evidence casting doubt on Mary Domany's testimony and therefore it was proper for the jury to weigh this evidence.

Petitioners' contention that the Court of Appeals in ordering that the issue of Mary Domany's contributory negligence be submitted to the jury denied them their constitutional rights afforded by the Seventh Amendment is patently frivolous. The key that unlocks the door to the Seventh Amendment is the re-examination of a fact tried by a jury. Here the Court of Appeals did not re-examine any fact tried by a jury. The opposite is true. It reversed because a fact issue had not been examined by the jury in the first instance.*

Petitioners inappropriately cite and place great reliance upon *Gibson* v. *Lockheed Aircraft Service, Inc.*, 350 U. S. 356, 76 S. Ct. 366, 100 L. Ed. 395 (1956) as "convincing precedent" for their position. But there, unlike here, the question of contributory negligence was submitted to the jury. The sole question in *Gibson* was the

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* Petitioners cite *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1956); *Galloway* v. *United States*, 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943); *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439 (1933) for the proposition that a reviewing court may set aside a jury verdict only when there is an error of law. In the case at bar the trial court committed an error of law in refusing to submit the issue of contributory negligence to the jury. These cases, therefore, are authority for the denial of the petition.

sufficiency of the court's instruction on the subject. Hence *Gibson* has no application here.

Whether or not Mary Domany was holding the handrail was clearly a fact question for the jury. This factual element has been held to be properly considered in measuring contributory negligence of plaintiffs who claim they were caused to fall while on an escalator, *Myers* v. *Kaufmann Department Stores, Inc.*, 57 F. Supp. 577 (W. D. Penn., 1944), aff'd 149 F. 2d 968 (CA 3, 1945) and submission of the issue was clearly required under Ohio law. *McMutrie* v. *Wheeling Traction Co.*, 107 Ohio St. 107, 140 N. E. 636 (1923); *Baldridge* v. *Wright Gas Co., Inc.*, 154 Ohio St. 452, 96 N. E. 2d 300 (1951); *Sypherd* v. *Haeckl's Express, Inc.*, 341 F. 2d 65, 69 (CA 6, 1965).*

The Marriage Issue

In their struggle to create a Constitutional issue and thereby obtain a review of the evidence by this Court, petitioners imaginatively claim that the Court of Appeals should have accorded full faith and credit to Andrew Domany's oral declaration of a 1957 ceremonial marriage in Indiana. In the first place, the Court of Appeals did not rest its reversal on the question of the marital status of the petitioners but rather discussed this question, the applicable presumptions when an impediment to a second

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* Nor would the submission of the issue of contributory negligence in this case require the jury to predicate one inference upon another as petitioners argue. Under Ohio law the establishment of a fact upon separate and parallel inferences is in itself not an inference but a fact upon which other inferences may be predicated. *Hurt* v. *Rogers Transportation Company*, 165 Ohio St. 329, 130 N. E. 2d 820 (1955); *McDougall* v. *Glenn Cartage Co.*, 160 Ohio St. 522, 160 N. E. 2d 266 (1959) and the Court of Appeals properly so held.

marriage is shown and the burden of proving the dissolution thereof as a guide to the parties and the court upon a retrial of the case. The choice of abandoning or pursuing the claim that petitioners are married rests with petitioners. If there was no impediment to the marriage of 1957, petitioners may pursue the claim and should have no difficulty in proving the dissolution of the first marriage at the new trial.

Under the Constitution, Congress was authorized to prescribe the manner in which public acts and records of sister states shall be proved in order to be given full faith and credit. Accordingly, Congress enacted Title 28 United States Code, Section 1739, and prescribed that full faith and credit shall be given non-judicial records upon proof of an exemplified copy thereof. Petitioners offered no documentary evidence of the marriage but only the oral testimony of Andrew Domany. Accordingly, plaintiff's proof did not even bring into play Article IV, Section 1, of the United States Constitution.

Moreover, the Court of Appeals accepted the testimony of Andrew Domany concerning the 1957 Indiana ceremony. However, the record showed that Andrew Domany was previously married and there was no evidence of a termination of that marriage. Under the circumstances, the Court of Appeals properly applied the Ohio law in this diversity case when laying down the guidelines relating to the presumption that arises when a prior marriage has been shown and the burden of proving that such marriage has been terminated. Ohio law clearly presumes the continuance of a prior marriage and places the burden of proving the termination thereof on the parties claiming a valid second marriage. *Industrial Commission of Ohio* v. *Dell,* 104 Ohio St. 389, 135 N.E. 669 (1922). The contention advanced in the petition filed in this Court that

the decision of the Court of Appeals is in conflict with the Ohio cases cited by petitioners is without merit. The cited cases are not in point. In *Machransky* v. *Machransky,* 31 Ohio App. 482, 166 N.E. 2d 423 (1927), the issue of whether a first marriage would be presumed to have continued was not involved because the evidence showed that such prior marriage had been dissolved. In *Olijan* v. *Lublin,* 38 Ohio L. Abs. 393, 50 N.E. 2d 264 (1943), aff'd 143 Ohio St. 417, 55 N.E. 2d 658 (1944), the court recognized and acknowledged the Ohio rule but held it unnecessary to apply the rule because there had been no credible evidence to establish the first marriage.

Obviously recognizing the correctness of the Court of Appeals enunciation of Ohio law, petitioners now contend that the Court of Appeals should not have applied Ohio law but that the law of Indiana governs. This argument was neither raised in the trial court nor in the Court of Appeals for the Sixth Circuit. Aside from the fact that this Court has consistently held that it will not consider an issue raised for the first time in a petition for certiorari, *McCullough* v. *Kammerer Corporation,* 323 U. S. 327, 65 S. Ct. 297, 89 L. Ed. 273 (1945), the contention is without merit since on the issue of presumptions and burden of proof the Court of Appeals properly applied Ohio law under *Erie* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).*

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* Petitioners cite *Mazzolini* v. *Mazzolini,* 168 Ohio St. 357, 155 N. E. 2d 206 (1958) for the proposition that the validity of a marriage is to be determined by the law of the situs of the marriage. However, that decision does not concern itself with the question of what presumptions apply or which party has the burden of proving the validity of a second marriage when the record shows a prior marriage. The other decisions of this Court cited by Petitioners to the same effect as *Mazzolini* are equally inapplicable.

CONCLUSION

For the foregoing reasons it is respectfully submitted that no grounds exist for granting the petition.

Respectfully submitted,

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May 22, 1957